EDITOR'S NOTE

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92-186

No. A-860

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

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CATHERINE BARBER & AS EXECUTRIX,

Petitioner

versus

SOMERVILLE HOSPITAL,INC.& ASSIGNS;

DR.A.H.FINE,

INTERNAL MEDICINE SERVICES,INC.& ASSIGNS;

VISITING NURSE,INC.& ASSIGNS,

Respondents

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT,

COMMONWEALTH OF MASSACHUSETTS

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**PETITION FOR WRIT OF CERTIORARI**

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Catherine Barber
PRO SE, PETITIONER
3 Solon Street
Wellesley,MA.02181
(617) 235-3249

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## QUESTIONS PRESENTED

1. Whether judgment by default should have been taken by the clerk against eeach of the 3 defendants because there was no answer to plaintiff (nor to court) within the 20 days requirement of the summonses?

2. Whether defendants should have been defaulted (and damages assessed) by judge (or clerk 55(A)) because court was informed of defaults but plaintiff was given wrong information and clerical errors made?

3. Whether the court erred in denying plaintiff's requests for discovery to defendants when it allowed discovery to defendants from the plaintiff?

4. Whether the court erred in denying discovery because it is needed to make informed decisions about defendants and assigns?

5. Whether the court erred in dismissing

case for failure to post bonds because this is not a tribunal case?

6. Whether the court erred in dismissing the case because there is sufficient evidence for the plaintiff to prevail under any standard of review?

7. Whether the court erred in judgment of Internal Medicine Services,Inc. and assigns because it is a Mass. corporation to which plaintiff made payment after its president,Dr.Fine sent a bill for medical services to her mother?

8. Whether violations of court rules and laws by attorneys, clerks and judges were so numerous (causing plaintiff to file many notices of appeals) that taken together indicate bias and discrimination?

9.ET SEQ. Whether the court erred concerning each issue of law in each of plaintiff's notices of appeals as if questioned here separately?

## LIST OF PARTIES

The parties are listed in the caption.[1]

It is unknown if any of the three corporations[2] have parents or subsidiaries because discovery was denied to the plaintiff petitioner.

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[1] There was no appearance for Internal Medicine Services,Inc.& assigns, and Dr.Fine was represented as an assign of Somerville Hospital,Inc.

[2] Somerville Hospital,Inc., 230 Highland Ave.,Somerville,MA. is registered with the Division of Public Charities of the Attorney General's office, and has an extension for 1991 until August 15,1992 to comply with the requirements of that office.

Internal Medicine Services,Inc.,236 Highland Ave.,Somerville,MA. is a for profit corporation registered with the Secretary of State. Dr.Fine holds all of the offices, and has filed the required annual reports.

Visiting Nurse,Inc. changed its name 5/14/90 to Visiting Nurse Association of Eastern Massachusetts, Inc.; new address is 131 Highland Ave.,Somerville,MA. and is registered with the Secretary of State as a non-profit and has filed its 1991 report. (It is not rercorded as a charitable organization with the Division of Public Charities of the office of the attorney general.)

NO. A-860

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COMMONWEALTH OF MASSACHUSETTS

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**PETITION FOR WRIT OF CERTIORARI**

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The petitioner, Catherine Barber and as executrix, respectfully petitions for a Writ of Certiorari to review the Notice of Denial of F.A.R. Application of the Mass.Supreme Judicial Court..

## OPINIONS BELOW

The Mass. Supreme Judicial Court Notice of Denial of Further Appellate Review (F.A.R.) Application is reproduced in the Appendix at App.B,2a and was reported at 412 Mass.Reports 1101.

The Mass. Appeals Court Memorandum and Order Under 1:28 is reproduced in the Appendix at App.C,3a-8a and was reported at 31 Mass.App.Ct.1116.

The Mass. Appeals Court Order, Petition for Relief Under M.G.L. Ch.231 §118 of Interlocutory Order, February 13,1990 is reproduced in the Appendix at App.D,9a.

The Mass.Dedham Superior Court Order, July 6,1990 is reproduced in the Appendix at App.E,10a.

## JURISDICTION

The Mass. Supreme Court issued the Notice of Denial of F.A.R.Application February 26,1992. The Mass.AppealsCourt issued the Memorandum & Order Under 1:28 December 3,1991.

The petitioner's time within which to file this petition was extended to July 25,1992 by order of Associate Justice of the Supreme Court of the U.S. Mr.David H. Souter dated May 15, 1992. (App.A,1a).

The jurisdiction of this Court is conferred by 28 U.S.C. §1257.

## STATUTES INVOLVED

**U.S.Constitution:** Amendment I: religion; Amendment XIV: life,liberty, due process of law,equal protection of laws,(privacy)

**Mass.Rules of Civil Procedure:**

Rule 4 (footnote of summons), Rule 11 Appearances and Pleadings; Rule 34(b) Production of Documents; Rule 37(b)(C) Failure to Make Discovery:Sanctions; Rule 55 Default. (Appendix 11a-16a).

**Mass. General Laws:**

M.G.L.ch.111§70 Patient's Rights (17a-22a)

M.G.L.ch.214§1B Right of Privacy; Remedy to Enforce (23a).

M.G.L.ch.231§60B Tribunal for Screening Medical Malpractice Claims;Evidence Considered; Subpoena Power; Witnesses; Bond Requirements; Provider of Health Care Defined (24a-27a).

M.G.L.ch.233§79C Certain Statements of Fact or Opinion Admissible in Evidence in Cases of Contract or Tort for Malpractice, When (App.28).

U.S.Presidents Commission for the Study of Deciding to Forgo Life Sustaining Treatment, Washington,D.C.,March 1983: Somerville Hospital,Guidelines:Orders Not to Resuscitate,by hospital president Norman L.Girard (App. 29a-34a).

Mass. Superior Court Rule 9A and Rule 9D (App. 51a).

## STATEMENT OF THE CASE

The petitioner entered a Complaint in the Dedham Superior Court, Norfolk County, Mass. against three corporations and their assigns as a result of an unwanted "Do Not Resuscitate" order deliberately issued against the petitioner's mother who died within a few hours after being admitted to the hospital August 6,1983, and without even the promised relief of her 101° -102 °fever. Also included in the Complaint was an injury of the petitioner treated at the defendant hospital.

The track designation of the case was contract and amended to include privacy and Constitutional Rights.[3]

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3. The Complaint implied Constitutional Rights; the amendment to complaint was more specific. For example: Amended Count 6: "The decision to hospitalize was based on the fact that August 15 is a very important religious day - feast day of the Somerville Greek Orthodox Church, Dormition of the Virgin. The plaintiff wanted to take her mother to church and although the

Please see 1)An Additional Statement of the Case (App.37a-38a) that needs clarification, and 2)Specific References Where Federal Questions Sought to be Reviewed were Raised.(S Ct Rule 14.1(h)). 3)FurtherRule 14.1(h)references.(38a-51a)

Since the entire proceedings were unjust, for the appeal after final judgment, the entire records were submitted in the Appendix as Exhibit/s also. And now with the addition of the appeals courts records, in order to preserve the issues for possible further proceedings, the petitioner repeats and incorporates by reference the entire records.

3/ nurse expressed confidence that she could take care of the fever at home, the nurse felt it would be taken care of faster in the hospital and in time for August 15."

Amended Count 7: "Dr.Fine ignored the plaintiff when she tried to explain that there was a language barrier and that her mother could answer his questions if she knew what he was asking. Dr.Fine ignored the plaintiff's offer to translate his questions to Greek. Dr.Fine ignored the plaintiff's pleas for their rights under the Patient's Bill of Rights,Constitutional rights, privacy rights, and for obeying state and federal laws."

## REASONS FOR ALLOWANCE OF THE WRIT

The Massachusetts superior court departed from what one expects to be the usual course of judicial proceedings, and the appeals court and then the supreme judicial court sanctioned the departures that necessitate calling for an exercise of the U.S. Supreme Court.

The superior court should be for the enforcement of the Rules of Civil Procedure and laws. The appeals courts should be for those who want to challenge rules and laws.

If the Mass.R.Civ.P.4 had been enforced from the beginning and the defendants defaulted (appropriate for the offenses), the court would also have been in compliance with R.Civ.P.1- "to secure the just, speedy and inexpensive determination of every action." The case would then have proceeded to discovery for assessment of damages.And,

Visiting Nurse,Inc. has still not given records as stated in the appeals court opinion as being a moot issue. Somerville Hospital violated it own "Guidelines: Orders Not to resuscitate" submitted to the President's Commission, written in 1980, printed in the government publication March 1983 before the decedent was hospitalized and died August 1983.

And, since the Mass.Bar Association (for violations of Rule 11), the Committe on Judicial Conduct (unenforcement of rules, violations of due process, equal protection), and the office for violations by clerks (refusing to correct harmful errors) have been ineffective and the petitioner was even obstructed by a judge's order in reporting alleged violations to a court in another county, the petitioner, an ethical,moral and law abiding citizen, respectfully requests that the Court exercise its power.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Catherine Barber

Catherine Barber
Pro se Petitioner
3 Solon Street
Wellesley, MA.02181
(617)235-3249

Filing Date:July 27,1992

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No.

A-860

Catherine Barber,

Petitioner

v.

Somerville Hospital Inc., et al.

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O R D E R

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UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 25, 1992.

/s/ David H. Souter

Associate Justice of the Supreme Court of the United States

Dated this 15th day of May, 1992.

APPENDIX B

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 Courthouse
Boston,Mass.02108
(617) 725-8055

TO: Catherine Barber
3 Solon Street
Wellesley MA 02181

RE: Docket No. FAR-06017
CATHERINE BARBER vs. SOMERVILLE HOSPITAL, INC. & others

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on February 26 1992, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: February 26,1992

To: Catherine Barber
Richard M. Haley, Esquire
Andre A.Sansoucy,Esquire

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

90-P-1220

CATHERINE BARBER, individually and as executrix,

vs.

SOMERVILLE HOSPITAL,INC.,& others.[1]

MEMORANDUM AND ORDER UNDER RULE 1:28

This action arises out of the death of Urania Spinos. The plaintiff appeals from the entry of judgments for the defendants. There is no reversible error.

1. Default judgments were not required to be entered as to the defendants Somerville Hospital and Fine immediately upon their failure to file answers to plaintiff's complaintis. The court has flexibility whether to order a default where answers to the complaint were filed two days late. See 10 Wright,Miller&Kane,

Federal Practice and Procedure §2682, at 412-413 (2d ed.1983).

Nor was there any error in vacating the default against the defendant Visiting Nurse,Inc.(Somerville)(VNI). Even if the propriety of the allowance of the motion to remove default is determined by reference to the standard of "excusable neglect" (compare Old Colony Bank & Trust Co. v. Tacey Trans.Corp.,10 Mass.App.Ct. 825,825-826 (1980), with Cicchese v. Tape Time Corp., 28 Mass.App.Ct.72,74 n.3 (1989)), there was no abuse of discretion See Bucchiere v. New England Tel.&Tel.Co. Mass. 639,641(1986). The factors suggested in Berube v. McKesson Wine & Spirits Co.,7 Mass.App.Ct.426,430-431 (1979),were met here. VNI acted promptly. (A.Vol.3,pp 104-119;Vol.9,pp.363-364.) There appears to be a meritorious statute of limitations defense. (A.Vol.1,p.1;Vol.2,p.54;

Vol.3,p.106.) The conduct occurred before trial. The neglect was not counsel's doing, and VNI tried to cure the default it self soon after it occurred. We discern no prejudice to the plaintiff.

2. Although the plaintiff complains that the defendants did not respond to requests for discovery, she does not specify how she was harmed. Cf. First Natl Bank v. Slade, 379 Mass. 243,244-245 (1979). Moreover, the plaintiff was supplied with relevant documents (see A.Vol. 3,pp.116-119; Vol.6,pp.226-236), and VNI hasagreed to deliver documents relating to the decedent's case to the plaintiff. See Easton Mobile Homes,Inc. v. Curtis, 9 Mass. App.Ct.930,930-931 (1980)(action became moot when the plaintiff received the relief it sought).

3. Although the plaintiff claims both that her allegations place the case

outside the scope of the medical malpractice tribunal and that there are errors in the composition of the tribunal panel, her cryptic assertions in her main brief do not amount to adequate appellate argument. Compare Hastoupis v. Gargas, 9 Mass.App.Ct.27,39(1980). "A pro se litigant is bound by the same rules of procedure as litigants with counsel." International Fid.Ins.Co. v. Wilson, 387 Mass. 841,847(1983).

Furthermore, the allegations in the complaint sound in medical malpractice. (See A.Vol.2,p.57.) The substance of the claim determines its character. Compare Schenker v. Binns, 18 Mass.App.Ct.404, 406-407 (1984). So viewed, it was appropriate that a medical malpractice tribunal pass on the plaintiff's claims.G.L.c. 231§60B.

The offer of proof is viewed most favorably for the plaintiff. Little v. Rosenthal, 376 Mass.573,578(1978). The offer of proof does not adequately support the plaintiff's claims. Whether the decedent was appropriately treated during her final illness requires the assistance of expert evidence. This is not one of those exceptional cases in which such evidence may be dispensed with, and a jury, "instructed by common knowledge" could determine whether there was malpractice. See Ward v. Levy, 27 Mass. App. Ct. 1101,1102(1989).

4. Finally, the plaintiff contends it was error to allow the motion to dismiss her claim against "Dr.Albert H.Fine, M.D.,Internal Medicine Services, Inc. and assigns" on the basis that Internal Medicine Services, Inc.,was a fictional entity. (A.Vol.13,pp.527-528). The plaintiff alleges no misconduct by this entity

aside from the conduct of the defendant Fine. Since the plaintiff has not shown any viable claim against the defendant Fine, she has no claim against Internal Medicine Services,Inc.

5. We do not reach other issues which the plaintiff suggests, but does not argue. See Mahaney v. John Hancock Mut.Life Ins.Co., 6 Mass.App.Ct.919,921 (1978).

Judgments affirmed.
By the Court (Brown,Parada & Jacobs,JJ.),

/s/Nancy Turk Foley
Clerk

Entered: December 3,1991.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

90-J-78

CATHERINE BARBER

vs.

SOMERVILLE HOSPITAL,INC.,ET AL.

ORDER

A petition does not lie to the single justice from the action of the tribunal. Relief may be sought from the amount of the bond if the plaintiff is indigent,but only after such a motion has been filed with and heard by the judge who was a member of the tribunal.

The time for filing the bond is extended to March 5,1990 to permit the plaintiff to file, on or before such date, such a motion before Judge Hurd if she believes she has a legitimate claim of indigency.

By the Court (Dreben,J.),

Assistant Clerk

Entered:February 13,1990

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

NORFOLK,ss.

SUPERIOR COURT
CIVIL ACTION
NO. 89-2149

ORDER

This justice, as Regional Administrator of the Superior Court in Norfolk County, hereby orders that no documents be accepted from the plaintiff in this Court, except as they may relate to appeal; or in any other Court relating to the subject matter of this dispute.

This case is no longer in a trial posture.

By the Court,

Roger J.Donahue
Regional Administrative
Justice
Norfolk County

DATED:July 6,1990

Relevant sections of the summons that was served by a deputy sheriff on each of the three defendants:

COMMONWEALTH OF MASSACHUSETTS

NORFOLK,ss. SUPERIOR COURT
CIVIL ACTION
NO.81-2149

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v.

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SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon.....plaintiff,whose address is...,an answer to the complaint which is herewith served upon you,within 20 days after service of this summons upon you, exclusive of the day of service.If you fail to do so,judgment by default will be taken against you for the relief demanded in the complaint.You are also required to file your answer to the complaint in the office of the Clerk of this court at Dedham either before service upon plaintiff's attorney or within a reasonable time thereafter.

.....

Witness, Robert L.Steadman,Esquire..

Nicholas Barbadoro,Clerk

Notes:

1.This summons is issued pursuant to Rule 4 of the Massachusetts Rules of Civil Procedure.

Mass.R.Civ.P. 11. Appearances & Pleadings

(a) Signing. Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is admitted to practice in this Commonwealth. The address of each attorney and his telephone number shall be stated. A party who is not represented by an attorney shall sign his pleadings and state his address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, iformation, and belief there is a good ground to support it; and that it is not interposed for delay. If a pleading is not signed,or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading had not been filed. For a wilful violation of this rule of an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indicent matter is inserted.

.....

(d) Change of Appearance. In the event an attorney who has heretofore appeared, ceases to act, or a substitute attorney or additiional attorney appears, or a party heretofore represented by an attorney appears without an attorney,

or an attorney appears representing a heretofore unrepresented party, or a heretofore stated address or telephone number is changed, the party or attorney concerned shall notify the court and every other party (or his attorbey, if the party is represented) in writing, and the clerk shall enter such cessation, appearance,or change on the docket forthwith. Until such notification the court, parties,and attorneys may rely on action by, and notice to,any attorney previously appearing (or party heretofore unrepresented), and on notice,at an address previously entered.

**Mass.R.Civ.P. 34. Production of Documents**

Rule 34(b) ...except that a defendant may serve a response within 45 days after service of the summons and complaint upon the defendant.

**Mass.R.C.v.P. 37. Failure to Make Discovery: Sanctions**

Rule 37(b)(C) ...or rendering a judgment by default against the disobedient party.

**Mass.R.Civ.P. 55. Default**

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered af follows:

(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due and affidavit that the defendant is not an infant or incompetent person, shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear.

(b) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 7 days prior to the hearing of such application. If,in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to

determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by statute.

(4) Affidavit Required. Notwithstanding the forgoing, no judgment by default shall be entered until the filing of an affidavit made by any competent person,on the affiant's own knowledge, setting forth facts showing that the defendant is nota person in military service as defined in Article I of the "Soldiers' and Sailors' Civil Relief Act" of 1940, as amended, except upon order of the court in accordance with the Act.

M.G.L.Ch.111§70E. Patient's Rights.

As used in this section, "Facility" shall mean any hospital, institution for the care of unwed mothers, clinic, infirmary maintained in a town,convalescent or nursing home, rest home, or charitable home for the aged, licensed or subject to licensing by the department; any state hospital operated by the department; any "Facility" as defined in section three of chapter one hundred and eleven B; any private, county or municipal facility, department or ward which is licensed or subject to licensing by the department of mental health pursuant to section 29 of chapter 19; any "Facility" as defined in section 38 of chapter 123; the Soldier's Home in Holyoke, and the Soldiers' Home in Mass. and any facility set forth in section one of chapter nineteen.

The rights established under this section shall apply to every patient or resident in said facility. Every patient or resident shall receive written notice of the rights established herein upon admittance into such facility, except that if the patient is a member of a health maintenance organization and the facility is owned or controlled by such organization, such notice shall be provided at the time of enrollment in such organization, and also upon admittance to said facility. In addition, such rights shall be conspicuously posted in said facility.

Every such patient or resident of said facility shall have, in addition to any other rights provided by law, the

right to freedom of choice in his selection of a facility, or a physician or health service mode, except in the case of emergency medical treatment or as otherwise provided for by contract, or except inn the case of a patient or resident of a facility named in section fourteen A of chapter nineteen; provided,however, that the physician, facility,or health service mode is able to accomodate the patient exercising such right of choice.

Every such patient or resident,upon reasonable request,shall receive from a person designated by the facility an itemized bill reflecting laboratory charges, pharmaceutical charges, and third party credits and shall be allowed to examine an explanation of said bill regadless of the source of payment. This information shall also be made available to the patient's attending physician.

Every patient or resident of a facility shall have the right:

(a) upon request, to obtain from the facility in charge of his care the name ans specialty,if any, of the physician or other person responsible for the care or coordination in his care;

(b) to confidentiality of all records and communications to the extent provided by law;

(c) to have all reasonable requests responded to promptly and adequately within the capacity of the facility;

(d) upon request, to obtain an explanation as to the relationship, if any, of the facility to any other health care facility or educational institution insofar as said relationship

relates to his care or treatment;

(e) to obtain from a person designated by the facility a copy of any rules or regulations of the facility which apply to his conduct as a patient or resident;

(f) upon request, to receive from a person designated by the facility any information which the facility has available relative to financial assistance and free health care;

(g) upon request, to inspect his medical records and to receive a copy thereof in accordance with section seventy,and the fee for said copy shall be determined by the rate ofcopying expenses

(h) to refuse to be examined,observed,or treated by students or any other facility staff without jeopardizing access to psychiatric,psychological,or other medical care and attention;

(i) to refuse to serve as a research subject and to refuse any care or examination when the primary purpose is educational or informational rather than therapeutic;

(j) to privacy during medical treatment or other rendering of care within the capacity of the facility;

(k) to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purposss of prior discussion of the source of payment unless such delay can be imposed without material risk to his health, and this right shall also extend to those persons not already patients or residents of a facility if said facility has a certified emergency care unit;

(l) to informed consent to the extent provided by law;and

(m) upon request to receive a copy of an itemized bill or other statement of charges submitted to any third party by the facility for care of the patient or resident and to have a copy of said itemized bill or statement sent to the attending physician of the patient or resident.

Every patient or resident of a facility shall be provided by the physician in the facility the right:

(a) to informed consent to the extent provided by law;

(b) to privacy during medical treatment or other rendering of care within the capacity of the facility;

(c) to refuse to be examined,observed,or treated by the students or any other facility staff without jeopardizing access to psychiatric,psychological or other medicasl care and attention;

(d) to refuse to serve as a research subject,and to refuse any care or examination when the primary purpose is educational or informational rather than therapeutic;

(e) to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purposess of prior discussion of source of payment unless such delay can be imposed without material risk to his health;

(f) upon request, to obtain an explanation as to the relationship,if any,of the physician to any other health care facility or educational institutions insofar as said rrelationship related to his care or treatment,and such explanation shall include said physiciasn's ownership of financial interest,if any,

in the facility or other health care facilities insofar as said ownership relates to the care or treatment of said patient or resident;

(g) upon request to receive an itemized bill including third party reimbursements paid toward said bill, regardless of the sources of payment;and

(h) in the case of a patient suffering from any form of breast cancer, to complete information on all alternative treatments which are medically viable.

Any person whose rights under this section are violated may bring, in addition to any other action allowed by law or regulation, a civil action under sections sixty B to sixty E,inclusive,of chapter two hundred and thirty-one.

No provision of this section relating to confidentiality of records shall be construed to prevent any third party reimburser from inspecting and copying, in the ordinary course of determing eligibility for or entitlement to benefits, any and all records relating to diagnosis,treatment, or other services provided to any person, including a minor or incompetent, for which coverage, benefit or reimbursement is claimed, so long as the policy or certificate under which the claim is made provides that such access to such records is permitted. No provision of this section relating to confidentiality of records shall be construed to prevent asscess to any such records in connection with any peer review or utilization review procedures applied and implemented in good faith.

No provision herein shall apply to any institution operated or listed and certified by The First Church of Christ,Scientist,in Boston,or patients whose religious beliefs limit the forms and qualities of treatment to which they may submit.

No provision herein shall be construed as limiting any other right or remedies previously existing at law.

**Mass.G.L.ch.214§1B: Right of Privacy; Remedy to Enforce.**

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

**M.G.L.ch.231§60B. Tribunal for Screening of Medical Malpractice Claims; Evidence Considered; Subpoena Power; Witnesses; Bond Requirements; Provider of Health Care Defined.**

Every action for malpractice,error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a physician licensed to practice medicine in the commonwealth under the provisions of section two of chapter one hundred and twelve and an attorney authorized to practice law in the commonwealth, at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result.

Said physician shall be selected by the single justice from a list submitted by the Mass.Medical Society representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth under the provisions of section 2 of ch.112. The list submitted to the single justice shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility outside the county where said institution

is located. The attorney shall be selected by the single justice from a list submitted by the Mass.BarAssoc. The attorney and physician and physician shall,subject to appropriation,each be compensated in the amount of fifty dollars.

Where the action of malpractice is brought against a provider of health care not a physician, the physician, the physician's position on the tribunal shall be replaced by a representative of that field of medicine in which the alleged tort or breach of contract occurred, as selected by the superior court justice in a manner he determines fair and equitable.

Where there are codefendants representing more than one field of health care the superior court justice shall determine in his discretion who shall represent the health care field on the tribunal.

Each action for malpractice shall be heard by said tribunal within fifteen days after the defendant's answer has been filed. Substantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion. Admissible evidence shall include, but not be limited to, hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication,statements of fact or opinion on a subject contained in a published treatise,periodical,book or pamphlet

or statements by experts without the necessity of such experts appearing at said hearing. The tribunal may upon the application of either party or upon its own decision summon or subpoena any such records or individuals to substanciate or clarify any evidence which has been presented before it and may appoint an impartial and qualified physician or surgeon or other related professional person or expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto. Such a witness shall be allowed traveling expenses and a reasonable fee to be fixed by the tribunal which shall be assessed as costs. The testimony of said witness and the decision of the tribunal shall be admissible as evidence at a trial.

If a finding is made for the defendant the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of two thousand dollars secured by cash or its equivalent with the clerk of the court in which the case is pending,payable to the defendant for costs assessed, including witness and experts fees and attorneys fees if the plaintiff does not prevail in the final judgment.Said single justice may,within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. Upon motion filed by the plaintiff, and a determination by the court that the plaintiff is indigent said justice may reduce the amount of the bond but may not eliminate the requirement thereof

For the purposes of this section,a provider of health care shall mean a person,corporation,facility or institution licensed by the commonwealth to provide health care or professional services as a physician,hospital,clinic or nursing home,dentist,registered or licensed nurse,optometrist,podiatrist, chiropractor,physical therapist or psychologist,or an officer, employee or agent thereof acting in the course and scope of his employment.

The expenses and compensation of said tribunal shall be paid by the common wealth,provided,however,that the pro rata percentage of such expenses and compensation engendered by actions brought against providers of health care registered under chapter one hundred and twelve shall not be in excess of the amounts received by the commonwealth for registration fees for such providers of health care under said chapter one hundred and twelve, less the amount expended for expenses and compensation of the respective boards of registration of said providers of health care under said chapter one hundred and twelve.

**M.G.L.Ch.233§79C. Certain Statements of Fact or Opinion Admissible in Evidence in Cases of Contract or Tort for Malpractice, When.**

Statements of facts or opinions on a subject of science or art contained in a published treatise, periodical,book pr pamphlet shall, in so far as the court shall find that the said statements are relevant and that the writer of such statements is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice,error or mistake against physicians,surgeons, dentists,optometrists,hospitals and sanitaria, as evidence tending to prove said facts or as opinion evidence; provided,however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action, give the adverse party or his attorney notice of such intention,stating the name of the writer of the statements, the title of the treatise,periodical,book or pamphlet in which they are contained, the date of publication of the same, the name of the publisher of the same, and whatever possible or practicable the page or pages of the same on which the said statements appear.

U.S.PRESIDENT'S COMMISSION FOR THE STUDY OF DECIDING TO FORGO LIFE SUSTAINING TREATMENT, Washington,D.C.,March,1983. (U.S.Government publication). Orders Against Resuscitation,pp.507-510.

Somerville Hospital,Guidelines:Orders Not to Resuscitate*

It is sometimes appropriate to issue a "Do Not Resuscitate" (DNR) order and to enter this order in a patient's medical record. In all cases, the procedures and documentation described below must be carried out. In some cases prior judicial approval is required, and in all cases the Chief of Service must be kept informed.

These guidelines have been adopted by the Medical Board and approved by the Board of Trustees to assist the medical and nursing staff in decision-making and in the preparatiion of an adequate record for the entry of a DNR order, and for the open sharing of that decision once properly made. When individual patient decisions prresent questions which are not answered by these guidelines, or when judicial approval may be required, nursing and medical staff should contact the hospital administration regardless of the time or day.

1.Cases Not Requiring Judicial Approval

a. The Competent Patient

A competent patient,for the purpose of these guidelines, is an adult (18 or over, or an emancipated minor) who

*Somerville Hospital, 230 Highland Ave., Somerville,Mass.02143 (Feb.27,1980).

is conscious, able to understand the nature and severity of the illness and the relative risks and alternatives, and able to make informed and deliberate choices about the treatment of the illnes

A competent patient may request the entry of a DNR order at any time without prior judicial approval. The attending physician must then consult with the patient to insure that the patient understands the illness and the probable consequences of refusing resuscitation treatment; that is, that the decision represents the informed choice of a competent patient. The patient's mental condition should be documented in the medical record. If there is any question about the patient's competence,a consultation should be obtained from a phychiatrist. The patient must always receive the benefit of doubt concerning competence. The irrationality from a purely medical perspective of a patient's request for a DNR order or refusal to consent to a DNR order is not sufficient in itself to deem a patient incompetent. In doubtful cases, judicial review of competence may be obtained.

The execution of a "living will" may be considered, but it is neither essential nor sufficient documentation of a decision to order the entry of a DNR order.

In this circumstance, approval of the next-of-kin is not required, and they cannot overrule the informed decision of a competent patient. Nevertheless, the patient's family should

be informed of the patient's decision and of the hospital's intention to abide by that decision.

In all instances where a competent patient requests entry of a DNR order, the Chief of Service or his designate must be informed before such orders are written,even thouqh the Chief of Service cannot deny such a request from a competent patient.

**b. The Incompetent Patient**

An "incompetent" patient, for the purpose of these guidelines, is a patient who is under 18 (unless an emancipated minor) or who is unable to understand the nature and consequences of the illnes or is unable to make informed choices about treatment of the illness.

If an incompetent patient is irrever sibly and terminally ill, and death is imminent, DNR orders may be entered without prior judicial approval. Before entering such an order the attending physician must consult with and have the consent of the patient's family including, at least, the same family members who would be sought out to consent to post-mortem examination. In addition, the attending physician should consult with, and have the concurrence of, the Chief of Service or his designate before entering such orders. This second opinion as to the irreversible nature of the patient's illness and the patient's moribund condition and imminence of death should be entered in the patient's record as well as the opinion of the first physician. If the incompetent

patient has no family or the family cannot be located,hospital administration should be consulted.

**c. Review**

The competence of any patient previously deemed incompetent without court order should be reviewed at least daily. DNR orders for all patients should also be reviewed at least daily to determine if they remain appropriate to the patient's condition and desires.

The physician must discuss his/her opinion and decision concerning both competence and DNR orders with the nursing staff from the outset and frequently thereafter.

**d. Documentation**

When a "DNR" order is decided upon, the order must be entered inthe patient's chart along with the justification for the order and notes by all consultants involved. Specific reference should be made to:

(1)Summary of initial staff discussion regarding the patient's condition as well as all subsequent follow-up discussions.

(2) A descriptive statement of patient's competence or incompetence For the incompetent patient, the record should include a notation of signs or conditions which indicat the patient's inability to understand or make medical decisions.

(3)A statement of the circumstances of the consent by the patient if the patient is competent, including staff discussions with the patient concerning the consequences of

the DNR order. For the incompetent patient, note in detail the discussions with the concurrence of all involved family as well as the Chief of Service or his designate.

**2.Illustrative cases of the incompetent Patient Requiring Prior Judicial Approval**

a. When a patient is terminally ill there is a chance of remission if treatment is administered, a decision to withhold resuscitation requires prior judicial approval. Even if the patient's next-of-kin assents, the physician may not withhold resuscitation without a court order.

b. When a patient is acutely but not terminally ill (in need of medical intervention or death will soon occur), and the quality of the life saved would be marginal, the decision to withhold resuscitation must have prior judicial approval.

c. When family members persist in demanding, for a terminally ill,dying patient, resuscitative efforts or DNR orders which are clinically inappropriate or not in the patient's interest, staff should consult hospital administration concerning judicial review of the patient's condition.

d. In any instance where judicial review is sought, the Chief of Service or his designate must be consulted in advance.

e. These guidelines may not be used to discontinue life supporting therapies or equipment. Should such questions arise, hospital administration should be consulted.

3.Other Important Considerations

Nothing in these procedures should indicate to the medical and nursing staff or to the patient and family an intention to disminish appropriate medical and nursing attention for the patient whatever the situation.

When the incompetent patient is sufficiently alert to appreciate at least some aspects of the care being received,every effort must be made to provide emotional comfort and reassurance appropriate to the patient's state of consciousness and condition. Unless it is clear to the contrary, the patient should always be presumed to be at least partially alert and receptive to verbal stimuli.

In every case in which DNR orders are isued, the hospital shall make available, to the greatest extent practicable, resources to provide counseling and other emotional support as appropriate for the patient's family and for all involved hospital staff,as well as for the patient.

(Signed)
NOrman E.Girard
President

REFERENCES WITH THE OFFER OF PROOF FOR THE MEDICAL MALPRACTICE TRIBUNAL

1. Friedman,E.,Ethics Issues for Health Care Professionals,1986.
page 17 A summary of the Conclusions of the President's Commission
page 213 Orders not to resuscitate.

2. Hastings Center, Guidelines on the Termination etc.,1987.
page 16(1)(b) Patient self-determination.
page 50 Periodic review of DNRorder.
page 137 Accomodating Religious Values and Beliefs.

3. Lynn, By No Extraordinary Means,1986.
Chapter 10,page 99 Perspectives of a Jewish Physician.

4. Macdonald,M.C.Health Care Law,1988.

5. Meyers,D.,Medico-Legal Implications of Death and Dying,1981.
Chapter 9 Orders Not To Resuscitate.

6. Orlikoff, Malpractice Prevention and Liability Control for Hospitals,1988.
pages 114-116 Patient Communication as a Risk-Management Technique.
page 143 about Home Care.
page 152 Conclusion.

7. President's Commission for the Study of Deciding to Forgo LifeSustaining Treatment,March 1983.
pages 507-510 Somerville Hospital Guidelines:Orders Bot to Resuscitate, Washington,D.C.,1983,by NormanE.Girard, President of Somerville Hospital.

8. Ross,J.W.,Handbook for Hospital Ethics Committees,1986.
pages 19,20 President's Commission; 76 Constitutional Issues;chapter 12 Treatment Decision Making;Appendix G page 149 Religion &Health Care Ethics.

9. Cruzan by Cruzan v. Director, Missouri Department of Health, 1105 Supreme Court Reporter 2841.

1) Additional Statements fromCourt Papers

After the emergency room where the DNR order had been issued,the patient was brought to a private room although the plaintiff requested that there be at least one other person in the room. The plaintiff then kept recorting a malfunctioning machine (company is an assign,but name unknown) that was not replaced.

Visiting Nurse,Inc.& assigns was included in the Complaint because they refused the plaintiff her mother's record and have not complied with the statutory requirement as of this writing.

The case was brought to court on the theories of contract,Constitutional rights(life,liberty interest for sself-determination,separation of church &state freedom of religion),common knowledge medical practice,privacy,breach of promise(relief of fever),assault,abandonment refusal of access to records,generally Patient's Bill of Rights, and other developing theories.

Each of the 3 corporations were properly served the papers by a deputy sheriff.All defendants defaulted but the court docket & procedure do not reflect the defaults.(In fact,there was an open bias,against the female non-attorney, and for the attorneys.

Judge R.Donahue, the assigned judge, knowing(or easily ascertaining) that this is not a medical malpracticeTribunal case pursuant to M.G.L.c.231§60B nevertheless allowed the case to proceed as such,denied or ignored the plaintiff's motions for adherence to the Rules of Court & laws and would not grant the

plaintiff one hearing. However, Judge Donahue allowed at v least one defense attorney direct access to him as did Judge Hurd who then held a "hearing" concerning the tribunal).

Judge Sandra Hamlin presided at a four,4) member tribunal hearing where the decision was made that the plaintiff had to post (3) $6,000. bonds in order to proceed. Clearly interlocutory,the plaintiff filed,in the AppealsCourt, an interlocutory appeal concerning the tribunal errors,incorrect records & other issued of law; these were incorrecly denied as interlocutory.

The plaintiff attempted to report alleged criminal offenses arising from this case, but was hindered by Judge Donahue's order as administrative justice

Without ever allowing the plaintiff a hearing JudgeDonahue allowed motions for failure to post tribunal bonds and four judgments were issued.

Appeals were procedural &substantive errors,2,generally violations of due process.

**2) Specific References Where Federal Questions Sought to be Reviewed Were Raised (S Ct Rule 14.1(h))**

The first reference concerning Constitutional rights,although not specifically stated as such, was in plaintiff's Report concerning Judge Hurd's Court Order "No Further Motions". (Later stated in the Appeals Ct. as due process issue.)[4]

(footnote next page)

Constitutional issues were mentioned in the Medical Malpractice Tribunal,Offer of Proof;the list of references submitted Jan.14,1990 is self-explanatory,relevant and reproduced in the Appendix

The tribunal findings were against the plaintiff who then filed for reconsideration Jan.16,1990 with arguments based on evidence (or lack of: no signature for DNR order),but also added:Moreover, major issues of Constitutional rights,access to records..do not require the procedural tribunal hearing. And,Jan. 16,1990 in the Appeals Ct.,documents was stated as due process issue.

Feb.17,1990 in plaintiff's opposition to VNI's motion to remove default: #7"..clerk's errors are not the responsibility of the plaintiff and should be addressed to the proper office or the Commonwealth."

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4. Excerpted from p.295 of final judgment appeal Appendix-Exhibits available in its entirety upon request.
REPORT CONCERNING JUDGE HURD'S COURT ORDER "NO FURTHER MOTIONS".....

December 29,1989 RebeccaJ.Wilson filed three motions for judicial review.Shouldn't she be held in contempt of court?

Is that order,as John Vaughan stated to the plaintiff, intended for only the plaintiff who, it should be noted,was incorrectly accused by JudgeHurd (instead of attorney William Davenport) of flooding the file?

**In the opinion of the plaintiff,it is the consequences of the violation of the constitutional right to due process, and the unenforcement of the law at the outset (don't the violators know their way to the appeals court?)that prolong cases in court.** (Jan.8,1990).

April 19,1990 Plaintiff's Cross-Motion for judical review and rulings of motions that went unreviewed and undecided by the judge to whom they were first submitted...due process issue.

Many requests for a hearing because all rulings against plaintiff.(due process, equal protection).

April 23,1990 Plaintiff's cross-motiuon for recusal of Judge R.Donahue is reproduced in Appendix

July 6,1990 JudgeR.Donahue issued an order reproduced in the Appendix later informed by a clerk that it had been authored by attorney Wm.Davenport without service to the plaintiff.(Due process,equal protection,obstructioin of the administration of justice? collusion? in response to motion for recusal?)

In the Superior Court the issues were raised by motions and procedures according to the Mass.Rules of Civil Procedure, and the new Superior Court Rule 9A.All rulings favored attorneys even when Rule 11 violations were reported.

The Interlocutory Appeal for tribunal & documents was filed according to the appeals court rules,but,incorrecly not considered interlocutory by that court.

The final judgment appeals were properly filed according to the court rules with briefs but the issues were

not confronted as the appeals court evasive decision should indicate. Moreover, petitioner still does not have the promised records (Rule 11), and the court's statement that the issue is moot is false. (Even if it were, damages are then assessed.)

As a law abiding citizen, all of the petitioner's efforts to have the rules of court and laws enforced were unsuccessful & resulted in this petition to the Supreme Court.

Further references in the record where Constitutional issues were raised are in the following pages.

(S Ct Rule 14.1 (h))

Excerpts from first Appeals Court brief after final judgment with minor changes.

**A. Judgment by Default**

1. Summons

The plaintiff,pro se,Ms.Catherine Barber comenced the civil actioin at the Dedham Superior Court August 4,1989 (Docket #1) pursuant to Mass.R.Civ.P.3. Three summonses were procured in blank from the clerk, and filled in by the plaintiff,pro se. (Mass.R.Civ.P.4(a)). Each summons bore the facsimile signature of the clerk, Mr.Nicholas Barbadoro;was in the name of the Commonwealth of Massachusetts; bore teste of RobertL.Steadman the first justice of the court;contained the name of the court and the name of the parties; was directed to each of the three defendants; stated the name and address of the plaintiff,pro se, and in two places stated the 20 days requirement within which to appear and defend by serving a written answer to the plaintiff; and notified him that,"If you fail to do so, Judgment by default will be taken against you for the relief demanded in the complaint."(References to the record are omitted.)

Service of all process was made by a deputy sheriff (M.R.Civ.P.4(c)). The plaintiff furnished the deputy sherif with the three summonses and complaints, served together (M.R.Civ.P.4(d)) and included Amendment to Complaint (Before Service), cover sheets and individualized requests for Production of Documents served upon the three corporations, incorporated in the Commonwealth of Mass.. Oct.25,1989, in compliance with M.R.Civ.P. 4(j) that service be made within 90 days of commencement, the

deputy sheriff served the three summonses together with a copy of the complaints and other papers by delivering them and "by giving in hand to" three named persons, "the manager and person in charge of its business" (M.R.Civ.P.(4)(d)(2)). The deputy sheriff's Proof of Service of Process was made in writing, returned to the court (Rule 4(f) by the plaintiff and docketed.

Answers were due to the plaintiff Nov.14,1989. Nothing arrived.

2. By Clerk and/or Judge-Rule 55(a), Motions

On or about Nov.14,1989 when answers were due,but not receeived, the plaintiff asked the clerks about a court form for defaulting the defendants and was told there is no form and that she had to type her own. The morning of Nov.20 still not having received any answers, the plaintiff typed and filed Judgment by Default with the required affidavit and Motion for Assessment of Damages against the three corporations. The clerk delayed docketing these until Dec.6,1989. The plaintiff later, on or about Nov.20 received a late answer from defense attorney for Somerville Hospital and Dr.Fine as an assign, and requests for a Medical Malpractice Tribunal. The clerk did not return the papers to the attorney for lateness,but docketed them.

By Nov.24 the plaintiff learned of the court form for Default Rule 55(a) and filed two against Visiting Nurse,Inc. &assigns and Internal Medicine Services, Inc.&assigns but was not allowed to file against Somerville Hospital. Then although a record of the defaulted defendants was sent to the plaintiff, the clerk failed to enter them on the

docket.

Although the plaintiff was assured that no papers would be accepted for docketing but would be returned to the defendants after the Rule 55(a) defaults, nevertheless failed to adhere to the procedure, accepted papers from the non-attorney director VN,Inc. and dockd docketed them.The clerk would not correct the clerical error, and informed the plaintiff that a motion to strike answer had to be filed by the plaintiff. As for the plaintiff's motions for assessmen of damages after default, those went ignored by the court. Plaintiff's motions to correct court records and to enforce the rules of court went unenforced.

All defendants failed to respond to requests for production of documents, but were incorrectly not defaulted for those failures.(M.R.Civ.P.37(b)(c)).

Dr.Fine,Internal Medicine Services, Inc.& assigns has never made an appearance.

B. Discovery

The plaintiff, for efficiency and in order to expedite matters, sent a set of individualized interrogatories to each of the 3 defendants and these were served with the summonses. According to Mass.R.Civ.P.34(b), a response wa due within 45 days after service of summons & complaint; responses were due De.11,1989. There was no response from VNInc. nor IMS,Inc. As for Somervill Hospital and Dr.Fine,an assign, Dec.5,'89 "Responses" were merely objections and evasive. Plff's motions to compel as were motions for a hearing were ignored. Plff's request for a protective order was ignored but she complied to prevent nesgative judicial decisions. Discovery Rules generally,34,26,37).

C. Medical Malpractice Tribunal

Tribunal statute M.G.L.c.231§60B..it is not a tribunal case (the surgeon is not included)..replace internist with an administrator..postpone hearing until after discovery for efficiency (Rule 1). Plff presnted written Offer of Proof at demands of hospital counsel.. The clerk added a fourth member to the tribunal (statute specifies 3). The tribunal issued findings unfavorable to plff...Appeals Court M.G.L.c.231§118, Interlocutory,was unsuccessful.

D. Rule 11,Clerical & Judicial Errors & Other Issues of Law in Entire Records.

...Attorneys, clerks and judges appear to exempt themselves from obeying laws and rules of court. For ex., the clerk assured the plff that no papers would be accepted from the two 55(a) defaulted defendants (see above),nevertheless accepted papers from the director of Visiting Nurses (who had consulted with her attorney brother) who included privileged records unreleased by the plaintff. The judge refussed to strike, required that an atty make an appearance for VNI,Inc. and allowed them. This was breach of privacy at the outset and an escalation of the case.

ARGUMENT

1. WHETHER JUDGMENT BY DEFAULT SHOULD HAVE BEEN TAKEN BY CLERK AGAINST EACH OF 3 DEFENDANTS BECAUSE THERE WAS NO ANSWER TO PLAINTIFF (NOR TO COURT WITHIN THE 20 DAYS REQUIREMENT OF THE SUMMONSES)

1) The official Commonwealth of Mass. summons is issued by the Clerk, and he should enforce its requirements.

2) If service had not been returned within 90 days of filing the complaint

Rule 4(j), the Clerk would have dismissed the case against the defendants even without a motion. This is unequal treatment of the parties.

3) Enforcing the summonses would meet the requirements of the equal protection clauses of the state & federal constitutions, due process, Mass.Rules of Court and Rule 11. Otherwise it would appear that the summons is not issued in good faith.

4.It would also be in keeping with Rule of Civ.P. 1.

5) The defendants failed to request enlargment of time or file a notice of appearance.

6) As a consumer of the court system, the court has not fullfilled obligations under the consumer protection laws. ¶ 7) When the plaintiff paid the court fee & purchased the summonses she entered into a contract with the court whose clerk failed his obligations.

8) It would have prevented the escalation of issues in the case with more filing fees and expenses in order to proceed, and the plaintiff is victim0-ized again.

9) Until the requirements of the commencement of an action and process of service are changed by the legislature they should be enforced.

2.WHETHER DEFENDANTS SHOULD HAVE BEEN DEFAULTED(RULE 55(A)) BECAUSE COURT WAS INFORMED OF DEFAULTS BUT PLAINTIFF WAS GIVEN WRONG INFORMATION AND CLERICAL ERRORS WERE MADE?

The statements are made on personal knowledge...repeats arguments of above. The court's indifference to errors is questionable.

3.WHETHER THE COURT ERRED IN DENYING PLAINTFF'S RLQUESTS FOR DISCOVERY FROM DEFENDANTS WHEN IT ALLOWED DISCOVERY TO DEFENDANTS FROM THE PLAINTIFF

This is an equal protection clause issue and invasion of privacy.

4. WHETHER THE COURT ERRED IN DENYING DISCOVERY BECAUSE IT IS NEEDED TO MAKE INFORMED DECISIONS ABOUT DEFENDANTS AND ASSIGNS?

No one should have to go to court to have access to their records and yet that is why VN,Inc was added in the complaint; moreover, they still have not complied, with the backing of the judge, and were using the records to have the case dropped against them.

The plff has also been denied records pursuant to the discovery rules..It appears that the rules of court are unenforceable when attorney are involved. As a consumer it is important to have information for informed decision making; it would also benefit the court to have accurate proceedings.

5.WHETHER THE COURT ERRED IN DISMISSING THE CASE FOR FAILURE TO POST BONDS BECAUSE THIS IS NOT A TRIBUNAL CASE?

(reference to Interlocutory appeal). The surgeon would have been included if it were a tribunal case, but even if it were, there was sufficient evidence for the plff to prevail under any standard of review..And procedural errors.

6.WHETHER THE COURT ERRED IN DISMISSING THE CASE BECAUSE THERE WAS SUFFICIENT EVIDENCE FOR THE PLAINTIFF TO PREVAIL UNDER ANY STANDARD OF REVIEW?

A "Do Not Resuscitate" order to someone who was not in a coma with that order in the medical record speaks for itself...it appears to the plff that the defense attorney is proceeding as if it were a criminal case..

7.WHETHER THE COURT ERRED IN THE JUDGMENT OF INTERNAL MEDICINE SERVICES,INC.&ASSIGN BECAUSE IT IS A MASS.CORPORATION TO WHICH PLFF MADE PAYMENT AFTER ITS PRESIDENT,DR.FINE SENT A BILL FOR MEDICAL SERVICES TO HER MOTHER?
It is undetermined if Dr.Fine was acting at the instructions of his assign/s, assign/s of his corporation, or from the hospital.

8. WHETHER VIOLATIONS OF COURT RULES AND LAWS BY ATTORNEYS, CLERKS AND JUDGES WERE SO NUMEROUS (CAUSING PLFF TO FILE MANY NOTICES OF APPEALS)THAT TAKEN TOGETH

ER INDICATE BIAS AND DISCRIMINATION?
The plaintiff interprets that Rule 11 includes judges, although judges also violated their judicial rule that another judge cannot rule on a motion for reconsideration.

9.ET SEQ. WHETHER THE COURT ERRED CONCERNING EACH ISSUE OF LAW IN EACH OF PLAINTIFF'S NOTICES OF APPEALS AS IF QUESTIONED HERE SEPARATELY?
A review of the records will show the extent of the violations, and the plff shall expand on any of them upon request.

CONCLUSION

...enforcement of the law and rules of court..

Relief requested: vacate judgments and make as many rulings on issues as judgment by default, discovery & others presented, and remand the case to the Superior Court,& to issue any other order in favor of the plaintiff that the court deems proper and just.

(Common knowldege medicine and common knowledge law especially since Cruzan by Cruzan v. Director,Missouri Department of Health,110 S Ct Reporter 2841.)

PLAINTIFF'S CROSS-MOTION FOR RECUSAL OF JUDGE ROGER DONAHUE

Now comes the plaintiff and moves to request the recusal of Judge Roger Donahue because of his refusal to enforce the Massachusetts Rules ofCivil Procedure, laws, plaitiff's constitutional rights, and, moreover, without checking the records, making incorrect assumptions damaging to the plaintiff.

The plaintiff alleges bias against the plaintiff and/or for the defendant/s; covering-up for the clerk's errors and/or judges' errors; or some other reason/s unknown at this time.

Considering Judge R.Donahue's good reputation, the plaintiff is surprised with the proceedings in this case and respectfully requests recusal.

The plaintiff requests a hearing.

Submitted by,

4/23/90 Ms.Catherine Barber,pro se

**Mass. Superior Court Rule 9(D). Motions for Reconsideration**

Motions for reconsideration and all briefs and affidavits filed by the moving party in support thereof shall be filed with the clerk and served on all parties. The words "MOTION FOR RECONSIDERATION" shall appear clearly in the title of the motion. Upon filing, the clerk shall transmit the motion and supporting papers to the Justice who decided the original motion. If upon reviewing the motion and supporting documents, the Justice who decided the original motion desires to hold a hearing on the motion for reconsideration, he or she may schedule a hearing thereon. Alternately, he or she may refer the motion for reconsideration to the Regional Administrative Justice for the region where the case is pending.

**Mass. Superior Court Rule 9A. Motions**

(based of Rule 11, complex and much abused).

Supreme Court, U.S.
FILED
AUG 18 1992
OFFICE OF THE CLERK

92-186

No. A-860

# In the Supreme Court of the United States

CATHERINE BARBER AND AS EXECUTRIX,
PETITIONER,

*v.*

SOMERVILLE HOSPITAL, INC., AND ASSIGNS;
DR. ALBERT H. FINE
INTERNAL MEDICINE SERVICES, INC.,
AND ASSIGNS;
VISITING NURSE, INC., AND ASSIGNS,
RESPONDENTS.

## BRIEF OF RESPONDENTS, SOMERVILLE HOSPITAL AND ALBERT H. FINE, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the dismissal of Petitioner's case pursuant to Massachusetts General Law Chapter 231, §60B presents an appropriate instance for issuance of a Writ of Certiorari.

2. Whether a Medical Malpractice Tribunal convened pursuant Massachusetts General Laws Chapter 231, §60B, properly determined that Plaintiff's offer of proof was insufficient to raise a legitimate question of liability appropriate for judicial inquiry.

3. Whether judgment properly entered dismissing the claim against Somerville Hospital and Albert H. Fine, M.D. on the basis of the Medical Malpractice Tribunal's finding and Plaintiff's failure to post the requisite bond.

4. Whether all other issues raised by Petitioner in her Petition for Writ of Certiorari fail to raise questions appropriate for appellate review.

## TABLE OF CONTENTS


Questions Presented ..... i
Table of Authorities ..... iv
Statutes Involved ..... 1
Statement of the Case ..... 1
Summary of the Argument ..... 2
Argument ..... 3
I. The Dismissal Of This Case Pursuant To M.G.L.c. 231, §60B, The So-Called Medical Malpractice Statute, Does Not Present An Appropriate Circumstance For The Granting Of Petitioner's Request For Issuance Of Writ Of Certiorari ..... 3
II. The Medical Malpractice Tribunal Properly Determined That Plaintiff's Offer Of Proof Was Insufficient To Raise A Legitimate Question Of Liability Appropriate For Judicial Inquiry ..... 4
III. Judgment For Defendants Properly Entered On The Basis Of The Medical Malpractice Tribunal's Finding 5
IV. All Other Issues Raised By Plaintiff In Her Brief Are Moot And/Or Fail To Raise A Question Appropriate For Appellate Review ..... 6
Conclusion ..... 7
Appendix A ..... A-1

## TABLE OF AUTHORITIES

*Cases*


| | Page |
|---|---|
| *Gugino* v. *Harvard Community Health Plan*, 380 Mass. 464 (1980) | 5 |
| *Johnson* v. *Stein*, 29 Mass. App. Ct. 996 (1990) | 6 |
| *Kilmartin* v. *Lowell General*, 22 Mass. App. Ct. 901 (1986) | 5 |
| *Little* v. *Rosenthal*, 376 Mass. 573 (1978) | 4, 6 |
| *Lubanes* v. *George*, 386 Mass. 320 (1982) | 4 |
| *McMahon* v. *Glixman*, 379 Mass. 60 (1979) | 5 |
| *Paro* v. *Longwood Hospital*, 373 Mass. 645 (1977) | 4 |
| *Salem Orthopedics* v. *Quinn*, 377 Mass. 514 (1979) | 6 |
| *Schenker* v. *Binns*, 18 Mass. App. Ct. 404 (1984) | 6 |
| *Ward* v. *Levy*, 21 Mass. App. Ct. 1101 (1989) | 5 |


*Statutes*


| | |
|---|---|
| 28 U.S.C.§1257(a) | 3, 4 |
| Massachusetts General Laws: | |
| c. 231, §60B | *passim* |
| §60C | 3, 4 |

# In the
# Supreme Court of the United States

No. A-860

CATHERINE BARBER AND AS EXECUTRIX,
PETITIONER,

*v.*

SOMERVILLE HOSPITAL, INC., AND ASSIGNS;
DR. ALBERT H. FINE
INTERNAL MEDICINE SERVICES, INC.,
AND ASSIGNS;
VISITING NURSE, INC., AND ASSIGNS,
RESPONDENTS.

## BRIEF OF RESPONDENTS, SOMERVILLE HOSPITAL, INC.* AND ALBERT H. FINE, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATUTES INVOLVED

Massachusetts General Law Chapter 231, Section 60B; and Massachusetts General Law Chapter 231, Section 60C are reproduced in Appendix A to this brief.

### STATEMENT OF THE CASE

On August 4, 1985, Ms. Catherine Barber commenced this action of medical malpractice in the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, alleging, *inter alia*, that the Defendants "failed to perform their duties in general and provide the standard of care expected when a patient is taken to a hospital"; that the Hospi-

* Somerville Hospital, Inc., Respondent, has no parent or subsidiary company to be listed pursuant to Rule 29.1 of the Rules of the Supreme Court.

tal was "negligent or failed to use due care in establishing emergency room procedures"; that the Defendants "abandoned" their patient; and that all Defendants "failed to adequately and properly treat the Plaintiff's decedent according to their respective professional standards."

Pursuant to M.G.L.c. 231, §60B, the Defendants made demand for the convening of a Medical Malpractice Tribunal, which was convened on January 12, 1990. Upon review of Plaintiff's offer of proof, and arguments of counsel and Ms. Barber, the Tribunal found as to all Defendants "[t]hat the evidence, if properly substantiated, is not sufficient to raise a legitimate question of liability appropriate for judicial inquiry and the Plaintiff's action is merely an unfortunate medical result." Plaintiff was ordered to post a bond, secured by cash or its equivalent, as a pre-condition to pursuit of the claim.

When the Plaintiff failed to post the requisite bonds, Defendants moved for dismissal, and the action was thereafter dismissed on April 30, 1990.

On appeal to the Appeals Court for the Commonwealth of Massachusetts, the judgments were affirmed. Plaintiff's Application for Further Appellate Review was thereafter denied by Supreme Judicial Court for the Commonwealth of Massachusetts on February 26, 1992.

## SUMMARY OF THE ARGUMENT

This is an action of medical malpractice that was dismissed pursuant to M.G.L.c. 231, §60B following a Medical Malpractice Tribunal's finding that Plaintiff's action was merely an unfortunate medical result. Pursuant to said statute, the posting of a six thousand dollar bond was set as a pre-condition to pursuing the claim through the usual judicial process. Plaintiff's dismissal for failure to post the requisite bond, as affirmed by the Appeals Court of the Commonwealth of Massachusetts, does not implicate the validity of any statute or treaty of the United States, or involve any title, right, privilege or immunity

claimed under the Constitution of the United States, or draw into question any state statute on the ground of its repugnance to the Constitution, treaties or laws of the United States. The dismissal of Plaintiff/Petitioner's case rested exclusively on state law grounds from which review by the United States Supreme Court, pursuant to 28 U.S.C., §1257(a), would be unwarranted.

## ARGUMENT

I. THE DISMISSAL OF THIS CASE PURSUANT TO M.G.L.c. 231, §60B, THE SO-CALLED MEDICAL MALPRACTICE STATUTE, DOES NOT PRESENT AN APPROPRIATE CIRCUMSTANCE FOR THE GRANTING OF PETITIONER'S REQUEST FOR ISSUANCE OF WRIT OF CERTIORARI.

For review by the United States Supreme Court, the state's decision must draw into question a state statute on the ground of its repugnance to the Constitution, treaties or laws of the United States.[1] 28 U.S.C., §1257(a). A State Court decision grounded exclusively on state law, as here, is not ripe for review by the United States Supreme Court.

In the case at bar, Petitioner filed a claim sounding in medical malpractice against the named Defendants. Pursuant to state law, M.G.L.c. 231, §60B, Petitioner was obliged to present an offer of proof to the Medical Malpractice Tribunal which "shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the Plaintiff's case is merely an unfortunate medical result." M.G.L.c. 231, §60B (1st para.)

The statute further provides that "[i]f a finding is made for the defendant . . . the plaintiff may pursue the claim through

[1] The state's decision in question neither implicates the validity of a treaty or state of the United States, nor involves any title, right, privilege of immunity claimed under the Constitution or Statutes of the United States.

the usual judicial process only upon filing bond in the amount of six thousand dollars in the aggregate secured by cash or its equivalent." *Id.* (6th para.) In the case of Ms. Barber, the evidence presented to the Tribunal was found insufficient to allow the case to proceed absent the filing of a bond. No bond was posted, and the case was dismissed.

The constitutionality of the statute is not at issue in this petition for Writ of Certiorari.[2] Instead, petitioner focuses on alleged clerical and procedural errors which were raised and disposed of in the state court forum. These matters were addressed and disposed of exclusively on state law grounds, without implication of the Constitution, laws or treatises of the United States. There exist no grounds for review by the United States Supreme Court under 28 U.S.C., §1257. The application of Section 60B to Petitioner's case is more fully developed below.

## II. The Medical Malpractice Tribunal Properly Determined That Plaintiff's Offer Of Proof Was Insufficient To Raise A Legitimate Question Of Liability Appropriate For Judicial Inquiry.

At the Tribunal stage, Plaintiff in a medical malpractice action must present evidence that her claim is meritorious, and not merely an "unfortunate medical result." M.G.L.c.231, Section 60B. The major legislative purpose of the tribunal procedure "is to protect the profession as well as the public interest against the often lengthy and costly pretrial and trial proceedings of unfounded negligence claims". *Lubanes* v. *George*, 386 Mass. 320, 325 (1982).

The standard of review in evaluating the tribunal's findings is "whether the material presented and the offer of proof, when presented to a jury, would be enough to defeat a defendant's motion for directed verdict." *Little* v. *Rosenthal*, 376 Mass.

[2] The constitutionality of the screening procedure of M.G.L.c. 231, §60B is discussed in *Paro* v. *Longwood Hospital*, 373 Mass. 645 (1977).

573, 578 (1978). See also, *McMahon* v. *Glixman*, 379 Mass. 60, 66 (1979); *Kilmartin* v. *Lowell General*, 22 Mass.App.Ct. 901 (1986).

The plaintiff must present "evidence" to be "properly substantiated" at trial; mere allegations of expected proof will not suffice. *Gugino* v. *Harvard Community Health Plan*, 380 Mass. 464, 468 (1980). Expert testimony is required to establish negligence in those instances where the allegations are beyond the competence of the lay person. *Ward* v. *Levy*, 21 Mass.App.Ct. 1101 (1989).

In the present case, the Tribunal correctly determined that the Plaintiff's offer of proof concerning the Somerville Hospital and Dr. Fine, as well as the other Defendant, Visiting Nurses, Inc., was insufficient to raise a legitimate question of liability appropriate for further judicial inquiry. There was no expert testimony offered critical of the care rendered. Only a rambling account of events confusedly related to Plaintiff's decedent, Urania Spinos' last hospitalization and ultimate demise were offered. There was no evidence which, if taken to be true, would support a finding of medical negligence on the part of the Somerville Hospital or Dr. Fine. Finally, there was no evidence of a causal relationship between the alleged negligence and the claimed damage. The tribunal voted appropriately against the Plaintiff.

## III. Judgment For Defendants Properly Entered On The Basis Of The Medical Malpractice Tribunal's Finding.

M.G.L.c. 231, Section 60B provides that "[i]f a finding is made for the defendant or defendants in the case the plaintiff may pursue to claim through the usual judicial process only upon filing bond in the amount of six thousand dollars. . . ." M.G.L.c. 231, Section 60B. Furthermore, "if said bond is not posted within thirty days of the tribunal's finding *the action shall be dismissed.*" *Id.* (emphasis supplied). Allowance of defendant's motions to dismiss for failure to post the requisite bond was proper, and in accordance with law.

Furthermore, the case in its entirety was properly dismissed on the basis of the Tribunal's finding notwithstanding the varied allegations, and notwithstanding the contention that the Tribunal lacked jurisdiction over what Plaintiff claims are non-medical issues. Plaintiff, herself, indicates that this is a case of malpractice against a provider of health care by invoking M.G.L.c. 231, Section 60C in her Civil Action Cover Sheet. She also alleges in her Complaint that the defendants "failed to perform their duties in general and provide the standard of care expected when a patient is taken to a hospital"; that the hospital was "negligent or failed to use due care in establishing emergency room procedures"; that Dr. Fine "abandoned" his patient; and that all Defendants "failed to adequately and properly treat the plaintiffs' decedent according to their respective professional standards." (Appendix 1-8)

In substance, the claim is one of malpractice. Section 60B is sufficiently flexible to encompass all theories alleged. See *Salem Orthopedics* v. *Quinn*, 377 Mass. 514 (1979) (claim of breach of promise to produce a specific medical result subject to screening provision of M.G.L.c. 231, Section 60B); *Little* v. *Rosenthal*, 376 Mass. 573 (1978) (medical tribunal has jurisdiction to hear unfair trade practice claim); *Johnson* v. *Stein*, 29 Mass.App.Ct. 996 (1990) (allegation of intentional misrepresentation by a health care provider to a patient is a proper subject for medical malpractice tribunal). What is at stake is a malpractice claim. This Court should look to that substance, not the legal theory adopted. *Schenker* v. *Binns*, 18 Mass.App.Ct. 404, 406-407 (1984). It is eminently appropriate in this case to allow the tribunal screening procedure to work as intended.

## IV. All Other Issues Raised By Plaintiff In Her Petition Are Moot And/Or Fail To Raise A Question Appropriate For Review On Writ Of Certiorari.

Ms. Barber has raised a myriad of issues in her Petition regarding discovery, default, bias, discrimination and other

issues only loosely identified. Said issues did not delay the affirmance of the Superior Court's actions in this case, and should not be grounds for review by the United States Supreme Court. All such issues were raised and disposed of on exclusively state law grounds. Issuance of a Writ of Certiorari is not warranted in this case.

## CONCLUSION

For the reasons and argument stated above, it is respectfully requested by Respondents, Somerville Hospital and Albert H. Fine, M.D., that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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# APPENDIX A

## Massachusetts General Laws c. 231

### § 60B. Malpractice action against provider of health care; tribunal; composition, etc.; evidence; witnesses; findings; expenses

Every action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a physician licensed to practice medicine in the commonwealth under the provisions of section two of chapter one hundred and twelve and an attorney authorized to practice law in the commonwealth, at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result.

Said physician shall be selected by the single justice from a list submitted by the Massachusetts Medical Society representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth under the provisions of section two of chapter one hundred and twelve. The list submitted to the single justice shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility outside the county where said institution or facility is located. The attorney shall be selected by the single justice from a list submitted by the Massachusetts Bar Association. The attorney and physician shall, subject to appropriation, each be compensated in the amount of fifty dollars.

Where the action of malpractice is brought against a provider of health care not a physician, the physician's position on the tribunal shall be replaced by a representative of that field of medicine in which the alleged tort or breach of contract oc-

curred, as selected by the superior court justice in a manner he determines fair and equitable.

Where there are codefendants representing more than one field of health care the superior court justice shall determine in his discretion who shall represent the health care field on the tribunal.

Each such action for malpractice shall be heard by said tribunal within fifteen days after the defendant's answer has been filed. Substantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion. Admissible evidence shall include, but not be limited to, hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet or statements by experts without the necessity of such experts appearing at said hearing. The tribunal may upon the application of either party or upon its own decision summon or subpoena any such records or individuals to substantiate or clarify any evidence which has been presented before it and may appoint an impartial and qualified physician or surgeon or other related professional person or expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto. Such a witness shall be allowed traveling expenses and a reasonable fee to be fixed by the tribunal which shall be assessed as costs. The testimony of said witness and the decision of the tribunal shall be admissible as evidence at a trial.

If a finding is made for the defendant or defendants in the case the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of six thousand dollars in the aggregate secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant or defendants in the case for costs assessed, including witness and experts fees and attorneys fees if the plain-

tiff does not prevail in the final judgment. Said single justice may, within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. Upon motion filed by the plaintiff, and a determination by the court that the plaintiff is indigent said justice may reduce the amount of the bond but may not eliminate the requirement thereof.

For the purposes of this section, a provider of health care shall mean a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment.

The expenses and compensation of said tribunal shall be paid by the commonwealth, provided, however, that the pro rata percentage of such expenses and compensation engendered by actions brought against providers of health care registered under chapter one hundred and twelve shall not be in excess of the amounts received by the commonwealth for registration fees for such providers of health care under said chapter one hundred and twelve, less the amount expended for expenses and compensation of the respective boards of registration of said providers of health care under said chapter one hundred and twelve.

Whenever the tribunal makes a finding, the clerk of the court shall, no later than fifteen days after such finding, send a copy of the complaint and finding to the board of registration in medicine.

Upon entry of judgment, settlement, or other final disposition at trial court level, the clerk shall, no later than fifteen days after such entry, send a copy of the judgment, settlement or other final disposition, to the board of registration in medicine. The terms of such judgment, settlement, or other final disposition shall not be sealed by agreement of the parties or by any

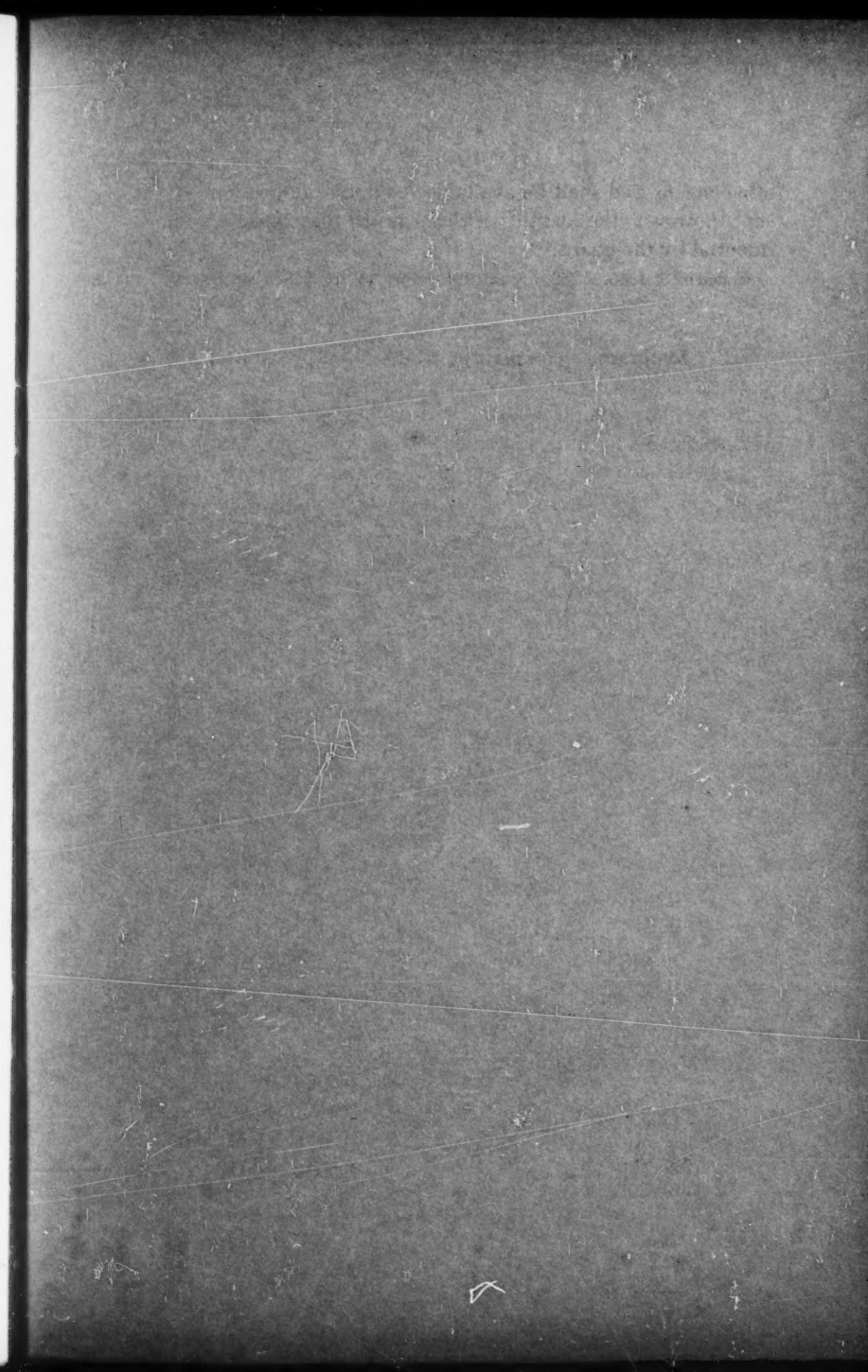
other means and shall be available for public inspection, except, however, the identity of the plaintiff may be kept confidential by the board.

Amended by St.1985, c. 759, § 3; St.1986, c. 351, §§ 21, 22; St.1988, c. 199, § 41.

## § 60C. Malpractice complaints; ad damnum prohibited

No writ or complaint for malpractice, error or mistake against a provider of health care shall contain an ad damnum or monetary amount claimed against such defendant.

Added by St.1975, c. 362, § 5.



# 92-186

No. A-860

Supreme Court, U.S.
FILED
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# In the
# Supreme Court of the United States

OCTOBER TERM, 1991

CATHERINE BARBER AND AS EXECUTRIX,
PETITIONER,

*v.*

SOMERVILLE HOSPITAL, INC., AND ASSIGNS;
DR. ALBERT H. FINE;
INTERNAL MEDICINE SERVICES, INC.,
AND ASSIGNS;
VISITING NURSE, INC., AND ASSIGNS,
RESPONDENTS.

**Brief of Respondent, Visiting Nurse, Inc.,
In Opposition to Petition for Writ of Certiorari.**

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## Table of Contents.


| | |
|---|---|
| Questions Presented | iii |
| Statutes Involved | iv |
| Statement of the Case | 1 |
| Summary of Argument | 4 |
| Argument | 5 |
| The Petition for Writ of Certiorari Should Be Denied Because the State Courts Relied Exclusively on State Law Grounds When They Rejected the Petitioner's Claims | 5 |
| I. The Petitioner Was Not Entitled to a Default Judgment Against Visiting Nurse | 5 |
| II. The Superior Court Judge Properly Dismissed Any Treatment-Related Claims Against Visiting Nurse | 7 |
| III. The Appeals Court Properly Concluded That the Petitioner's Medical Records Claim Was Moot | 8 |
| Conclusion | 9 |


## Table of Authorities Cited.

CASES.


| | |
|---|---|
| Berube v. McKesson Wine & Spirits, Co., 7 Mass. App. Ct. 426, 433, 388 N.E.2d 309, 313 (1979) | 6 |
| Cicchese v. Tape Time Corp., 28 Mass. App. Ct. 72, 74, 546 N.E.2d 384, 385 (1989) | 5 |
| Delicata v. Bourlesses, 9 Mass. App. Ct. 713, 404 N.E.2d 667 (1980) | 7, 8 |
| Eastern Mobile Homes, Inc. v. Curtis, 9 Mass. App. Ct. 930, 930-931, 404 N.E.2d 699, 670 (1980) | 9 |

Gugino v. Harvard Community Health Plan, 380 Mass. 464, 467-468, 403 N.E.2d 1166, 1168 (1980) 7

Little v. Rosenthal, 376 Mass. 573, 382 N.E.2d 1037 (1978) 7

Paro v. Longwood Hospital, 373 Mass. 645, 651, 364 N.E.2d 985, 989 (1977) 7

STATUTES.

Massachusetts General Laws
c. 112, § 12CC iii, 9
c. 231, § 60B *passim*

Massachusetts Rules of Appellate Procedure
Mass. R. App. P. 16(a)(4) ivn

## Questions Presented.[1]

(1) Whether the Massachusetts Appeals Court erred when it held that a Massachusetts Superior Court Judge did not abuse his discretion under the Massachusetts Rules of Civil Procedure when he allowed the motion filed by Visiting Nurse, Inc. ("Visiting Nurse")[2] to remove any default entered against it?

(2) Whether the Massachusetts Appeals Court erred when it held that the petitioner had not submitted sufficient evidence to a tribunal convened pursuant to G.L. c. 231, 60B, a Massachusetts statute which requires a tribunal to screen medical malpractice claims?

(3) Whether the Massachusetts Appeals Court erred when it held that the petitioner's claim for medical records from Visiting Nurse was moot where Visiting Nurse had agreed to produce the records?

[1] The Questions Presented are limited to those issues which were addressed by the Massachusetts Appeals Court and which involved Visiting Nurse. The petitioner waived all other issues because she did not argue them adequately in the brief she filed with the Massachusetts Appeals Court. *See* Mass. R. App. P. 16(a)(4); Appendix C, p. 80.

[2] Visiting Nurse, Inc. has changed its name to Visiting Nurse Association of Eastern Massachusetts, Inc. It has no parent corporation, and has no subsidiaries (other than wholly-owned subsidiaries).

## Statutes Involved.

General Laws c. 231, § 60B is reproduced in the Petition for Writ of Certiorari at pp. 24a-27a. General Laws c. 112, § 12CC is also pertinent, and it provides that:

> A health care provider who maintains records for a patient treated or examined by such provider shall permit inspection of such records by such patient or an authorized representative of the patient, and upon request and payment of a reasonable fee shall make a copy of such patients' record available to such patient or such representative. For purposes of this section, "health care provider" shall mean a person or entity providing medical care or services, including but not limited to, physicians and surgeons, therapists, dentists, nurses, optometrists, chiropractors, psychologists, podiatrists.

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AND ASSIGNS;
VISITING NURSE, INC., AND ASSIGNS,
RESPONDENTS.

**Brief of Respondent, Visiting Nurse, Inc.,
In Opposition to Petition for Writ of Certiorari.**

## Statement of the Case.

On August 4, 1989, the petitioner filed suit against several defendants, including Visiting Nurse. The complaint alleged that all defendants failed to provide the proper standard of care to the petitioner's mother, who died on August 6, 1983. It further alleged that Visiting Nurse had refused to provide the petitioner with copies of her mother's medical records. On November 24, 1989, the petitioner requested that a default judgment enter against Visiting Nurse.

On November 24, 1989, Visiting Nurse filed a *pro se* Motion to Extend Time Within Which To Answer Or In The Alternative To Set Aside Default and Answer Late, together with a Motion to Dismiss. Ultimately, no action as taken on these motions because the court ruled that Visiting Nurse had to obtain a lawyer. While Visiting Nurse's motions were pending, the petitioner had filed a Motion for Assessment of Damages against Visiting Nurse and Visiting Nurse had filed a *pro se* opposition to that motion.

The law firm of Parker, Coulter, Daley & White was then retained to represent Visiting Nurse. On December 19, 1989, Visiting Nurse filed an answer to the plaintiff's Amended Complaint along with an Opposition to Plaintiff's Request for Judgment by Default and Motion for Assessment of Damages. The opposition asserted that counsel for Visiting Nurse was not retained until the week of Monday, December 11, 1989. Furthermore, the opposition asserted that, prior to obtaining that counsel, Visiting Nurse had attempted to discharge its obligations in good faith by filing a motion to dismiss. Visiting Nurse's answer to the complaint was filed with the opposition to Plaintiff's Request for Judgment by Default and Motion for Assessment of Damages. On December 29, 1989, Visiting Nurse filed a second Motion to Dismiss which asserted that the statute of limitations barred the plaintiff's claims, but the court never acted on that motion.

Under Massachusetts law, claims for medical malpractice are submitted to a tribunal which considers whether the evidence submitted by the plaintiff "if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." G.L. c. 231, § 60B. If the tribunal rules against the plaintiff, the plaintiff may pursue her claim in court only if she posts a bond. *Id*. In this case, a medical malpractice tribunal issued findings in favor of Somerville Hospital, Visiting Nurse, and Dr. Fine in January, 1990.

On February 23, 1990, Visiting Nurse filed a Motion to Remove Default. Visiting Nurse's motion asserted that counsel for Visiting Nurse was not retained until the week of Monday, December 11, 1989. Furthermore, in the interim, Visiting Nurse had attempted to discharge its obligations in good faith by filing a Motion to Dismiss. When counsel had been retained in December, 1989 to represent Visiting Nurse, she had called the clerk's office at Norfolk Superior Court and was told that a default had *not* entered against Visiting Nurse. Counsel also obtained a docket sheet which did not show that a default had been entered on the docket. On February 1, 1990, Visiting Nurse's counsel called the clerk's office again, because of the petitioner's repeated assertions that Visiting Nurse had been defaulted. At that point, the clerk's office informed her that Visiting Nurse had been defaulted, but that the default was not entered on the docket because of an error by the clerk's office. On March 5, 1990, a Superior Court judge allowed the Motion to Remove Default.

When the petitioner failed to post a bond pursuant to G.L. c. 231, § 60B, Visiting Nurse, Somerville Hospital and Dr. Fine all moved to dismiss and that motion was granted. On appeal, the Massachusetts Appeals Court affirmed the judgment. With respect to Visiting Nurse, Inc., the Massachusetts Appeals Court ruled that: (1) there was no error in removing the default entered against Visiting Nurse, Inc.; (2) the request for records claim was moot because Visiting Nurse had agreed to produce the records; (3) the medical malpractice tribunal statute, G.L. c. 231, § 60B, applied to the petitioner's claims; and (4) the offer of proof that the petitioner filed with the medical malpractice tribunal did not adequately support her claims. (See Appendix C to Petition for Writ of Certiorari.) The Massachusetts Supreme Judicial Court denied the petitioner's Application for Further Appellate Review. (*See* Appendix B to Petition for Writ of Certiorari.)

## Summary of Argument.

The Petition for Certiorari should be denied because the decision of the Massachusetts Appeals Court is based entirely on state law grounds. The Massachusetts Appeals Court did not consider any federal questions.

Furthermore, the Massachusetts Appeals Court properly applied state law precedents in resolving the petitioner's appeal. The Massachusetts Appeals Court properly concluded that a Massachusetts Superior Court Judge did not abuse his discretion in removing any default against Visiting Nurse. In fact, several factors supported the Superior Court judge's ruling: (1) before Visiting Nurse retained counsel, it attempted in good faith to comply with its obligations; (2) once Visiting Nurse retained counsel, counsel acted promptly and properly to remove the default; (3) the petitioner did not establish that she was prejudiced by the delay; and (4) Visiting Nurse's defenses to the petitioner's claims had some merit.

The Massachusetts Appeals Court also correctly held that the Superior Court had properly dismissed any treatment-related claims against Visiting Nurse. A medical malpractice tribunal convened pursuant to state law properly rejected the petitioner's medical claims because she did not have any expert testimony to support them.

Finally, the Massachusetts Appeals Court properly concluded that the petitioner's medical records claim was moot, where Visiting Nurse had agreed to provide the records to her.

## Argument.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURTS RELIED EXCLUSIVELY ON STATE LAW GROUNDS WHEN THEY REJECTED THE PETITIONER'S CLAIMS.

The decision of the Massachusetts Appeals Court was based entirely on state law and did not consider any federal questions. Indeed, in ruling in favor of Visiting Nurse, the Massachusetts Appeals Court simply applied established precedent construing Massachusetts law. *See* Petition for Writ of Certiorari, Appendix C. In this circumstance, the Petition for Writ of Certiorari should be denied. In any event, the Massachusetts Appeals Court's application of state law was correct. *See* pp. 5-9, *infra*.

### I. THE PETITIONER WAS NOT ENTITLED TO A DEFAULT JUDGMENT AGAINST VISITING NURSE.

Properly applying Massachusetts precedent concerning Massachusetts state court rules, the Massachusetts Appeals Court correctly concluded that the petitioner was not entitled to a default judgment against Visiting Nurse. Under Massachusetts law, the decision to remove a default is addressed to a trial judge's discretion. *See Cicchese* v. *Tape Time Corp.*, 28 Mass. App. Ct. 72, 74, 546 N.E.2d 384, 385 (1989). In this case, the Superior Court judge clearly did not abuse his discretion in removing any default against Visiting Nurse. Indeed, several factors supported the judge's ruling.

First, Visiting Nurse acted in good faith before retaining its current counsel. Although the plaintiff filed this action on August 4, 1989, Visiting Nurse was not served until October 25, 1989. Prior to retaining counsel in December, 1989 Visiting

Nurse attempted in good faith to discharge its obligations by filing a motion to dismiss, and a motion to remove default and enlarge time.

Second, Visiting Nurse's counsel acted promptly and properly in connection with the purported default. Upon being retained to defend Visiting Nurse, counsel called the clerk's office and was informed that Visiting Nurse had not been defaulted. Moreover, the docket sheet did not refer to any default. Visiting Nurse's counsel promptly filed an answer on December 19, 1989. When counsel learned of the purported default in February, 1990, she promptly filed a Motion to Remove the Default on February 23, 1990.

Third, the plaintiff made no showing that she was prejudiced by the ten-day delay in receiving Visiting Nurse's Motion to Dismiss.

Fourth, the motions to dismiss filed by Visiting Nurse show that its defenses had some merit. "The standard in this regard does not require a showing of certainty of success. All that is necessary is an indication that the claim is one worthy of judicial investigation because raising a material question of law meriting discussion and decision, or a real controversy as to essential facts arising from conflicting or doubtful evidence." *Berube* v. *McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 433, 388 N.E.2d 309, 313 (1979) (citation omitted). In this case, the motion to dismiss showed that: (1) from the face of the complaint, it was clear that any malpractice claim against Visiting Nurse was barred by the statute of limitations and (2) the petitioner's complaint failed to show how Visiting Nurse's failure to provide medical records to the petitioner caused any harm. Thus, the record before the judge who allowed the motion to remove the default showed that Visiting Nurse had defenses which were worthy of judicial investigation.

For all of these reasons, it is clear that the Superior Court judge did not abuse his discretion in removing any default against Visiting Nurse.

## II. The Superior Court Judge Properly Dismissed Any Treatment-Related Claims Against Visiting Nurse.

General Laws c. 231, § 60B establishes a screening procedure and a bonding requirement which are intended to "discourage frivolous medical malpractice claims, thus reducing the losses to the insurance companies and enhancing the likelihood of the future availability of coverage." *Paro* v. *Longwood Hospital*, 373 Mass. 645, 651, 364 N.E.2d 985, 989 (1977) (footnote omitted). It is settled that claims that nurses provided improper care are subject to the tribunal statute. *See Little* v. *Rosenthal*, 376 Mass. 573, 382 N.E.2d 1037 (1978) (claim against nursing home); *Delicata* v. *Bourlesses*, 9 Mass. App. Ct. 713, 404 N.E.2d 667 (1980) (claim against nurse).

Under the statutory procedure, a tribunal evaluates the plaintiff's offer of proof to determine "if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." G.L. c. 231, § 60B. Once the plaintiff submits her offer of proof, the tribunal applies a directed verdict test and determines whether a nurse-patient relationship is shown, whether there is evidence that the nurse's performance did not conform to good medical practice, and whether damage resulted therefrom. *See Delicata*, 9 Mass. App. Ct. at 717-718, 404 N.E.2d at 670. To establish these elements, the plaintiff must present evidence; mere allegations are not sufficient. *Gugino* v. *Harvard Community Health Plan*, 380 Mass. 464, 467-468, 403 N.E.2d 1166, 1168 (1980).

In this case, the petitioner's complaint broadly alleged that "[a]ll defendants failed to perform their duties in general and provide the standard of care expected when a patient is is [*sic*] taken to a hospital rather than treated at home . . ." and that

they "failed to adequately and properly treat the plaintiff's decedent according to their respective professional standards." From this broad language, it appeared that the petitioner might be alleging that Visiting Nurse provided improper medical care so that a tribunal was needed to evaluate that claim.

The brief which the petitioner filed in the Massachusetts Appeals Court made it clear, however, that the petitioner named Visiting Nurse as a defendant only to obtain medical records. *See* Petition for Writ of Certiorari, p. 37a ("Visiting Nurse, Inc. and assigns was included in the Complaint because they refused the plaintiff her mother's records. . . ."). She made no contention in her appellate brief that her offer of proof provided sufficient evidence that Visiting Nurse had improperly treated the decedent and thereby caused her death. In any event, the plaintiff's offer of proof did not include any expert testimony to support any medical claim against Visiting Nurse. *See Delicata*, 9 Mass. App. Ct. at 719, 404 N.E.2d at 671 (expert testimony usually necessary to support a medical malpractice claim).

It is apparent that the petitioner abandoned any treatment-related claim against Visiting Nurse. In any event, she failed to submit sufficient evidence to the tribunal to support such a claim and it is therefore clear that the Massachusetts Appeals Court correctly held that the Superior Court judge did not err in dismissing any treatment-related claim against Visiting Nurse.

## III. The Appeals Court Properly Concluded That The Petitioner's Medical Records Claim Was Moot.

While the petitioner's appeal was pending, the Massachusetts Legislature enacted a statute which requires a health care provider to allow a patient's representative to inspect and copy

medical records. *See* G.L. c. 112, § 12CC. Pursuant to this statute, Visiting Nurse agreed to provide a copy of the records to the petitioner. Consequently, applying Massachusetts law, the Appeals Court properly concluded that the medical records claim was moot.[3] *See Eastern Mobile Homes, Inc.* v. *Curtis*, 9 Mass. App. Ct. 930, 930-931, 404 N.E.2d 699, 670 (1980).

**Conclusion.**

For all of the foregoing reasons, the respondent, Visiting Nurse, Inc., respectfully submits that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

By its attorneys,

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[3] It is true that the petitioner has not actually obtained the records because she refused to accept them at the office of Visiting Nurse's counsel. Nevertheless, by tendering the records, Visiting Nurse has complied with its obligations.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

No. 92-186

In The
SUPREME COURT OF THE UNITED STATES
October Term 1992

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CATHERINE BARBER & AS EXECUTRIX,
Petitioner

versus

SOMERVILLE HOSPITAL,INC.& ASSIGNS;

DR.A.H.FINE,
INTERNAL MEDICINE SERVICES,INC.& ASSIGNS;

VISITING NURSE,INC.& ASSIGNS,
Respondents

---

PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT OR OTHER

---

**PETITIONER'S REPLY TO "BRIEF OF RESPONDENTS,SOMERVILLE HOSPITAL AND ALBERT H. FINE,M.D. IN OPPOSITION.."**

---

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1992

6

No. 92-136

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1992

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CATHERINE BARBER & AS EXECUTRIX,
Petitioner

versus

SOMERVILLE HOSPITAL,INC.& ASSIGNS;
DR.A.H.FINE,
INTERNAL MEDICINE SERVICES,INC.& ASSIGNS;
VISITING NURSE,INC.& ASSIGNS,
Respondents

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PETITION FOR WRIT OF CERTIORARI
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**PETITIONER'S REPLY TO "BRIEF OF RESPONDENTS,SOMERVILLE HOSPITAL AND ALBERT H. FINE,M.D. IN OPPOSITION.."**

---

Petitioner,Catherine Barber,respectally requests this Court to grant the Petition for Writ of Certiorari and reject the arguments in the opposition brief that contains major errors, omissions,distortions & alterations beginning with the caption on the cover readily compared with the correct petitioner's caption & signals the further

errors & ommissions to mislead the court. Material omissions on the cover and page 1 were the punctuation of the comma "," after Dr.A.H.Fine & the omission of "and assigns".(Dr.Fine is only one assign.) The petitioner considers these deliberate alterations as violations of Rule 11.

The default issue was not argued and,therefore, waived. The response of the hospital administrator to discovery was that he had no knowledge of the requests apparently including the hospital's guidelines for a DNR order (appendix of petition pp.29a-34a) & is either gross incompetence,perjury, other:, Rule 11 for counsel, and the issue is not argued and,therefore,waived.

Counsel's Statement of the Case on page 1 contains an admission of a judicial error; Judge Sandra Hamlin knowingly allowed "arguments of counsel"

at the MedicalMalpracticeTribunal where the plaintiff only makes an offer of proof.

Most of the hospital opposition brief is about the Medical Malpractice Tribunal but counsel failed to address the entire issues & errors of law; he failed to establish that this is a tribunal malpractice case under M.G.L.231§60B and,therefore,waived that basic issue. (Constitutional rights, assault etc.are not tribunal issues.) If,however, the court considers it a tribunal case,the errors of law (allowing argument by counsel,extra-statutory fourth member to the tribunal,non-acceptance of DNR order in writing,witness testimony of petitioner, treatises etc.admissible in evidence (Ch.233§79C),records of fever before and at death) would necessitate another hearing. (And,discovery before the hearing should not only be

allowed but also be mandatory.)

Moreover, counsel did not address the petitioner's questions as stated, and, therefore, waived the issues. His additional questions in the opposition are peripheral and irrelevant to the facts of this case. Counsel also did not "address any perceived misstatements of fact or law set forth in the petition which have a brearing on the question of what issues woyuld properly be before the Court is certiorari were granted"(SCt Rule 15.1) because there are no misstatemenbts of fact or law in the petition.

The DoNotResuscitate issue not only can be decided but has already been decided at the Supreme Court; the Cruzan case,now common knowledge medicine & law,was never mentioned, nor were the Constitutional issues of due process,equal protection and therefore waived.

As for counsel's fourth question,

the petitioner has been successful in preserving all issues of law (some of which are probably criminal)not only to achieve justice in this case,but also to open an investigation of the Mass.AppealsCourt that should probably be abolished, to investigate the other courts to possible put in receivership, impeach and disbar.

A default is most appropriate,then proceed to discovery (that should include "and assigns"; for assessment of damages.

**CONCLUSION**

Petitioner requests this Court to grant its Petition and the relief stated therein.

Respectfully submitted,

Catherine Barber

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Respondents

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PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH OF MASSACHUSETTS
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**PETITIONER'S REPLY TO BRIEF OF RESPONDENT VISITING NURSE,INC.,IN OPPOSITION;**

**INTERNAL MEDICINE SERVICES,INC.& ASSIGNS (NO OPPOSITION)**

---

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**PETITIONER'S REPLY TO BRIEF OF RESPONDENT VISITING NURSE,INC.,IN OPPOSITION**

**INTERNAL MEDICINE SERVICES,INC.& ASSIGNS (NO OPPOSITION)**

---

Petitioner,Catherine Barber,respectfully requests this Court to grant the Petition for a Writ of Ceriorari and reject the arguments in the "Brief of Respondent,Visiting Nurse,Inc.,In Opposition..". Internal Medicine Services,Inc. and assigns did not file a brief in opposition.

I. Visiting Nurse,Inc.& Assigns:

The opposition brief contains major errors,omissions,distortions and alterations beginning with the caption on the cover readily compared with petitioner's caaption and signals the further errors & omissions to mislead the court. Material omission on the cover & throughout is "and assigns". The petitioner considers this deliberate omission as a violation of Rule 11.

A. Default: When the time to reply to the complaint had expired, petitioner filed Request for Default(Pursuant to MAss.R.Civ.P.55(a)). Petitioner received confirming notice from the Clerk,but default was not entered on the docket, and the clerk refused to correct. Later, the Director of VN sent a letter (with United Way logo, and papers in legal language, and medical records of the ~~from~~ another agency unknown to the peti-

tioner. An attorney later made appearance

No reason was given to remove the default as required by the rules, nor could any reason be given because prior to the date to default the nurse's attorney brother telephoned the petitioner and threatened her. An answer instead of a threat would have saved the case from default. It was judicial error to remove the default, a violation of constitutional right to due process, equal protection;attorney vs. non-attorney,,obstruction of the administration of justice, appearance of collusion,dissemination of privileged records.
The now senior citizen has been harmed in not being able to work in her business The arguments are peripheral to the facts of this case & irrelevant. And,it was error for the courts not to consider the federal questions thus bring the case to the Supreme Court.

B.Treatment RelatedClaims are unknown since discovery was denied.

C.Medical Records:There are no records to date.The issue is not moot, respondent misleads & omits,but even if it were moot,when remanded for assessment of damages with jury, the complaint will be amended for invasion of privacy and dissemination.(Rule 11)(AnotherVN,Inc attorney was reported to post office for a pending criminal offense.)

D.Medical Malpractice Tribunal: Access to one's records is not a tribunal issue and it was error to require a bond to be posted.Discovery may reveal issue/s for a tribunal.

E."And Assigns" requires discovery.

A few issues are argued but the entire case,including interlocutory appeals,was preserved in the AppealsCourt Appendix as also Exhibit/s & nothing was waived.

II.Internal Medicine Services,Inc.& assigns. No opposition.

Request for Default (Pursuant to Mass.R. Civ.P.55(a));was filed and confirming notice was sent by the Clerk. No one has ever made an appearance.The case was incorrectly dismissed & should be remanded for discovery,assessment of damages with jury, unless defendant or court decides to first proceed with criminal assault.

## CONCLUSION

Petitioner requests this Court to grant its Petition and the relief stated therein.

Respectfully submitted,

Catherine Barber

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